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No. 88-1698

In The

Supreme Court of the United States

October Term, 1988

PHELPS DODGE CORPORATION

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Phelps Dodge has sought review of a Ninth Circuit opinion which holds in effect that the purported evidence of a civil rights "conspiracy" in this case was not only sufficient to avoid summary judgment, but would also be sufficient (as it must be under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)) to support a plaintiffs' verdict at trial. It should be cause for concern to this Court that while a majority of the *en banc* panel may have been satisfied with the "inference" of conspiracy to be drawn from this evidence, five other judges (including the trial judge, the majority of the three-judge panel and the two *en banc* dissenters) viewing the same evidence, found that it could give rise to an inference of conspiracy only by what the decision of the three-judge panel called "speculation and conjecture." (App. B-8). The defect in the *en banc* opinion which is underscored by this divergence of views is that the opinion is devoid of any standard by which to distinguish a legally justifiable inference from mere suspicion and speculation.

Plaintiffs' response to the Petition for Certiorari suggests that this Court need not and should not concern itself with this case because it is fact intensive, involving as it does issues of the sufficiency of plaintiffs' evidence to merit a trial. If this were the proper test for this Court's review, the Court would never have addressed the serious issues raised by *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970), *Anderson, supra, Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), or *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), each of which also dealt with purely legal issues of evidentiary standards on motions for summary judgment. These are issues of widespread and immediate

concern to every District Court in the country, particularly those which will be cited to the Ninth Circuit's opinion here – an opinion which constitutes seriously flawed precedent contradictory to this Court's prior decisions.

The Brief in Opposition begs the question by citing the Ninth Circuit's opinion as its own support, by mischaracterizing legal issues as factual questions, and by trying to downplay the importance of the evidentiary burden for avoiding summary judgment. In the process, plaintiffs have little to say about the arguments actually raised in the Petition for Certiorari. It is no answer for plaintiffs to contend that the Ninth Circuit cited and quoted this Court's prior decisions; the question is whether the Ninth Circuit followed them, and it did not.

Plaintiffs have not even addressed the errors of the Ninth Circuit in substituting a naked "assumption" of a conspiracy for a void in the evidence, its extraction of crucial affirmative "inferences" from at best neutral evidence, and its failure to require any evidence of the necessary element that a private party must have directed, controlled or participated in the purported civil rights violation before it may be liable under 42 U.S.C. § 1983. Plaintiffs also fail to address the chilling effect of the Ninth Circuit's opinion upon the right of a private citizen to enlist the aid of law enforcement authorities in the face of violence.

In addition to avoiding the legal issues, plaintiffs' response also abuses the evidentiary record. At pages 4 and 5, plaintiffs refer to a trial between the parties remaining in the case after Phelps Dodge was granted

summary judgment and argue that "it is this body of evidence to which the court below referred in declaring that there was a 'smoking gun' and asking whether petitioner 'helped pull the trigger.'" It would have been clearly erroneous for the Ninth Circuit to have based its decision in any part on the outcome of a trial to which Phelps Dodge was not a party and which took place after Phelps Dodge was granted summary judgment. Plaintiffs' suggestion that that trial provided the "smoking gun" referred to in the Ninth Circuit's opinion is nothing more than plaintiffs' attempt to rescue that court from its own egregious error of *assuming* a conspiracy as the predicate for its analysis. (It should be noted that the verdict so heavily relied upon by plaintiffs was not only outside the record but also made no finding of any conspiracy involving any defendant, much less Phelps Dodge.)

If, as plaintiffs suggest, the Ninth Circuit was of the impression that some conspiracy between others than Phelps Dodge (such as the Justice of the Peace and County Attorney's office) had been admitted for purposes of the motion and appeal, it was under a serious and perplexing misconception. As the Petition makes clear, the entire thrust of the underlying motion for summary judgment was the absence of *any* evidence to support plaintiffs' conspiracy allegations.

The Ninth Circuit did not, contrary to plaintiffs' Brief, "refer" to anything in support of its conspiracy finding. It merely "assumed" the existence of a conspiracy and, in doing so, departed from the requirements of *Celotex*, *Anderson* and *Matsushita*. While those cases stand for the proposition that mere claims without evidence will not suffice to get a case past summary judgment, the

case at bar stands for the incongruous notion that mere assumptions without evidence will.

Plaintiffs' Brief seriously distorts the evidence in other particulars as well, and without citations to the record. For example, the Brief suggests (p. 5) that the officials with whom Phelps Dodge is alleged to have conspired (the Sheriff, the Justice of the Peace, or others) "reluctantly" took the actions about which plaintiffs complain, and only at Phelps Dodge's insistence. As has been their pattern throughout this case, plaintiffs merely recite their own conclusions and inferences. They fail to refer to any evidentiary facts to merit these conclusions, nor were there any.

It would not be productive at this point to detail each of these factual distortions. The record will demonstrate what constituted evidence as distinguished from plaintiffs' (and the Ninth Circuit's) interpretation of the evidence.

This appeal is on an uncontradicted set of facts consisting almost exclusively of plaintiffs' own evidence. Phelps Dodge did not contradict plaintiffs' evidence for purposes of summary judgment, but rather challenged its sufficiency under the substantive law governing 42 U.S.C. § 1983. Phelps Dodge has asked this Court to review the matter in order to articulate the proper legal standard against which the evidence must be measured in assessing whether a plaintiff has met its evidentiary burden in proving a conspiracy by "inference."

It is not sufficient that the evidence merely gives rise to suspicion or that an inference can somehow be rationalized from the facts:

> "in drawing inferences . . . the court can draw only such inferences as a jury might have *fairly* drawn from the evidence. The court is not bound to draw inferences that are strained, forced, or contrary to reason." *Farmer's Ad. v. Ches. & Ohio Ry. Co.*, 144 Va. 65, 92, 131 S.E. 334, 342 (1926)(emphasis in original)(citations omitted); *accord* Williams v. Chesapeake Bay Bridge, 208 Va. 714, 717, 160 S.E. 2d 573, 575-76 (1968).

CUNA Mutual Insurance Society v. Navy Yard Credit Union, Inc., Nos. 860983, 861208, slip op. (Va., April 21, 1989).

It is respectfully submitted that the appropriate legal test for the permissibility of an inference of a civil rights conspiracy from circumstantial evidence is as has already been established by this Court with respect to antitrust conspiracy: in order to avoid summary judgment, plaintiff should be required to produce specific evidence which "tends to exclude" the possibility of non-conspiratorial conduct. *Matsushita, supra*, 475 U.S. at 588, quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). As applied to the instant case, if the inference that the challenged law enforcement action was the consequence of independent law enforcement decisions is "at least equal to the inference that it was due to conspiracy," then judgment was proper for Phelps Dodge. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968). The Ninth Circuit applied no such threshold standard. Instead, it held in effect that it would turn the entire matter over to a jury no matter how attenuated the "inferences" involved might be.

The Ninth Circuit's opinion violated this Court's standards for summary judgment for the additional reason that it relied upon unspecified "other" evidence which might be produced by plaintiffs at trial. The opinion concluded that "the disputed fact [the purported conspiracy] will be proven, if it can be, by other direct and circumstantial evidence." (A-24). Plaintiffs' Brief fails to address this problem. It was plaintiffs' responsibility to produce evidence in response to the motion (not at a later date) which could satisfy their evidentiary burden and support a plaintiffs' verdict. If they failed to specify such evidence, summary judgment was required. *Anderson*, 477 U.S. at 249-250. The Ninth Circuit's reversal on the theory that plaintiffs' case will be proven at trial, "if it can be," through "other" evidence not produced or identified in response to the motion, is directly at odds with that requirement.

Plaintiffs contend (at page 6) that in order to review the Ninth Circuit's opinion on certiorari, this Court would be required to "study the three volumes of evidence introduced by [plaintiffs] . . . in order to second guess . . . that a triable evidentiary case resides therein." Plaintiffs fail to recognize that it was their own burden to point to specific evidentiary facts in the record in opposition to Phelps Dodge's motion; it was not and is not the responsibility of this or any other Court to sift through an undifferentiated mass of "evidence" to preclude the existence of some fact which might bar summary judgment. Plaintiffs submitted reams of paper to the trial court, but

they never met their burden to set forth "specific facts" showing a genuine issue for trial. F.R.C.P. 56(e). If there was "other," better evidence, plaintiffs have never identified it.

Plaintiffs likewise fail even to address the substantive legal issue of whether a private defendant may be held liable under 42 U.S.C. § 1983 in the absence of any evidence that it directed, controlled or participated in the alleged civil rights violations by law enforcement authorities. This was another independent element of plaintiffs' claims for which there was insufficient evidence, and on that basis as well summary judgment was required.

This case is no more a simple dispute of fact than were *Adickes, Celotex, Anderson* or *Matsushita.* It involves far-reaching legal issues of conspiracy, summary judgment procedure and the law of evidence regarding inferences from circumstantial facts. The Ninth Circuit's *en banc* decision establishes several erroneous legal principles involving not only these issues but also serious public policy concerns regarding the public's exposure to charges of a civil rights "conspiracy" merely for asking law enforcement authorities for protection. For these reasons, Phelps Dodge petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals

for the Ninth Circuit to review and reverse the decision below.

Respectfully submitted,

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